

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 360 of 1996

in

SPECIAL CIVIL APPLICATION No 1505 of 1995

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE G.D.KAMAT and
MR.JUSTICE C.K.THAKKER

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SURESH KUMAR DUTT

Versus

UNION OF INDIA

Appearance:

MR PB SHARMA for Petitioner

MS PROMILA SAFAYA for Respondent No. 1

CORAM : THE CHIEF JUSTICE G.D.KAMAT and
MR.JUSTICE C.K.THAKKER

Date of decision: 04/09/96

ORAL JUDGEMENT (PER G.D.KAMAT C.J.)

Notice of admission waived on behalf of the respondents.

Admit. By consent to be heard forthwith.

Being aggrieved by an order dt. 18th November 1995 made in Special Civil Application No. 1505 of 1995, original petitioner, has instituted this Letters Patent Appeal.

Briefly stated the facts are that the appellant was employed as Sipoi-Driver on 19th October 1977 and in the ordinary course he was to retire on 18th October 1992. It appears that he had deserted the Army for a period of 473 days. His explanation that his wife was ailing, was not accepted and upon his surrender he was court marshalled. For that purpose he suffered imprisonment and detention. It appears that he was continued in service beyond 18th October 1992 but according to him all of a sudden by order/signal, he was discharged from the Army on 28th February 1993.

The appellant had instituted Special Civil Application No. 9158/93 making grievance against his discharge. According to the appellant, he was liable to get extension for a period of 473 days beyond 18th October 1992. However, by order dt. 28th October 1993, the learned Single Judge rejected the petition on the ground that reference/representation regarding the case of the appellant is pending decision with Defence Ministry, Government of India. The appellant aggrieved by the said order instituted Letters Patent Appeal i.e. LPA No.488 of 1993. The Division Bench rejected the appeal but at the same time directed Union of India to dispose of Reference/Representation pending with the Ministry of Defence. The Ministry of Defence, however, rejected representation/reference on the ground that there is no provision for condonation of deficiency in service when it exceeded beyond 180 days by order dated 22nd August 1994.

The appellant instituted Special Leave Application No.1505 of 1995 challenging the order of 22nd August 1994 and claiming entitlement to the service for a period of 473 days beyond 18th October 1992. However, the learned Single Judge by the impugned order dt. 18th November 1995 rejected Spl.Civil Application on the ground that principle of res judicata and/or principle of constructive res judicata is attracted inasmuch as the petitioner's earlier Special Civil Application was

rejected and it was confirmed by the Division Bench on 18th December 1993. Needless to say that the learned Single Judge did not touch the merit of the matter nor examined the grievances of the appellant in the Special Civil Application after a decision was reached on the reference.

We are unable to sustain the impugned order of the learned Single Judge. In the first place, it must be seen that when the appellant instituted earlier Special Civil Application No. 9158 of 1993 the same was not rejected on merits but solely on the ground that the reference was pending with the Ministry of Defence, Government of India. The same was the view taken by the Division Bench in Letters Patent Appeal No.488 of 1993 and what is more the Ministry of Defence was directed to dispose of the reference/representation within four months. By memorandum/order dt. 22nd August 1994, the Ministry of Defence, rejected the reference made on behalf of the appellant holding that there can be condonation of deficiency of service only to the extent of 180 days and no deficiency can be condoned if it is for more than 180 days. The petitioner's grievance in the Special Civil Application now is that rules applicable to him are not correctly interpreted nor rule invoked is attracted to his case. Inasmuch as earlier Special Leave Application had not been decided on merits, we are afraid, that this matter can be said to attract either principle of res judicata or principle analogous to the res judicata and/or constructive res judicata. In any case there was no decision on merit in earlier case. In this view of the matter, Letters Patent Appeal succeeds. The impugned order of the learned Single Judge dt. 18th November 1995 is quashed and set aside and Special Civil Application No.1505 of 1995 is remitted to the learned Single Judge to dispose of in accordance with law. We may make it clear that we have not examined merits and grievances in the Special Civil Applications. The matter is accordingly to be listed for hearing on admission. The appeal is allowed to the extent indicated. There shall be no order as to costs.

Dt.4.9.1996. (G.D.KAMAT CJ.)

(C.K.THAKKER J.)